

Cher  
v.  
Forum International, Ltd. et al.

District Court, C.D. California

No. 81 1461 R

Decided Jan. 15, 1982

**\*97** Action by Cher, against Forum International, Ltd., doing business as Forum Magazine, Penthouse International, Ltd., News Group Publications, Inc., doing business as the Star, and Fred Robbins, for violation of Lanham Act Section 43(a), misappropriation of the right of publicity, misappropriation for advertising, and unfair competition. Judgment for plaintiff.

Milton A. Rudin, John D. Forbess, Vickie Solomon, and Rudin, Perlstein & Chieffo, all of Beverly Hills, Calif., for plaintiff.

Douglas C. Conroy, Laura Lindgren, and Paul, Hastings, Janofsky & Walker, all of Los Angeles, Calif., for Forum International Ltd. and Fred Robbins.

**\*98** Louis P. Petrich, Joel M. Smith, and Youngman, Hungate & Leopold, all of Los Angeles, Calif., for Penthouse International, Ltd.

Lawrence W. Dam, Kevin R. Brehm, and Lillick, McHose & Charles, all of Los Angeles, Calif., and Neal Goldman, New York, N.Y., for News Group Publications, Inc.

Real, District Judge.

This action having been tried upon the facts by the Court without a jury, the Court does hereby find the facts and state separately its conclusions of law thereon, and directs the entry of the appropriate

judgment, as follows:

#### Findings of Fact

1. Plaintiff Cher is a resident and citizen of California, residing within the Central District.

2. Defendant Fred Robbins (hereinafter referred to as "Robbins") is a citizen of New York.

3. Defendant Forum International, Ltd. (hereinafter referred to as "Forum") is a New York corporation. Forum publishes a monthly magazine entitled Forum Magazine, which is sold and distributed in interstate commerce and in the Central District of California.

4. Defendant Penthouse International, Ltd. (hereinafter referred to as "Penthouse") is a New York corporation. Penthouse is the parent corporation of Forum through a series of corporate ownerships. Penthouse publishes a magazine entitled Penthouse Magazine, which is sold and distributed in interstate commerce and in the Central District of California.

5. Defendant News Group Publications, Inc. (hereinafter referred to as "News Group") is a Delaware corporation. News Group publishes a weekly tabloid entitled the Star, which is sold and distributed in interstate commerce and in the Central District of California.

6. The amount in controversy in the within dispute is in excess of \$10,000.

7. Cher is a well-known entertainer and has performed publicly for many years as a singer, recording artist, television personality and entertainer. There is a great deal of interest by the public worldwide in the events of Cher's life. Cher has exploited and licensed to others the right to exploit her name, likeness and personality, and received compensation therefore. Cher has created a substantial public identification of her as a personality, a substantial goodwill and secondary meaning with the public, and a substantial commercial value in her name, likeness, personality and endorsement of products. The name and likeness of Cher and the single name "Cher" have come to be known and associated with plaintiff Cher and are readily identifiable with Cher and with her services as an entertainment personality.

8. In or before April, 1980, Cher, through her representatives, agreed with US Magazine to

participate in a personal interview to be published as an exclusive cover story in US Magazine.

9. US Magazine assigned Robbins to conduct the interview of Cher for US Magazine and agreed to pay Robbins for conducting the interview. The idea for the interview of Cher for US Magazine did not originate with Robbins, but, rather, from discussions between Cher's agents and US Magazine.

10. As part of the agreement between Cher and US Magazine, it was agreed and understood by Cher, US Magazine, and Robbins, that it was a material condition of Cher's agreeing to give such interview that the interview appear as a cover story in US Magazine, that the interview was being given by Cher on the express condition that it appear only in US Magazine, and in no other publication at any time. Robbins, in conducting the interview, was acting in a capacity as an agent of US Magazine rather than in any capacity of a freelance journalist.

11. On or about April 4, 1980, Robbins conducted a tape recorded interview for US Magazine with Cher in Atlantic City (the "Interview"), and Robbins caused to be prepared a transcript of the Interview. In conducting said Interview, Robbins was acting in the capacity of an agent of US Magazine rather than as a freelance writer, and Robbins was aware that he was acting in such capacity.

12. Following the Interview, Cher notified US Magazine that she did not approve of the Robbins' Interview and requested that a new interview be conducted. US Magazine agreed not to publish the Robbins' Interview and a new interview was conducted and published in US Magazine.

13. Robbins was aware that Cher had requested of US Magazine that US Magazine not publish the Robbins' Interview, and Robbins was aware that US Magazine had agreed to Cher's said request. Robbins requested permission from Cher to broadcast the Interview on his radio \*99 show, and Cher's permission was denied. However, Robbins did broadcast portions of the Interview on his radio show on four separate occasions after his request to Cher had been denied.

14. Notwithstanding any purported release of rights by US Magazine to Robbins, Robbins knew of the conditions imposed by Cher under which she agreed to give the interview, and that any publication other than in US Magazine would require Cher's consent.

15. After Robbins was notified by US Magazine that it would not publish the Interview and returned the Interview to him Robbins sold the Interview to Forum for publication in Forum Magazine. Robbins informed Forum that the Interview had been done originally for US Magazine.

16. At no time did Robbins contact or attempt to contact, in any manner, Cher or any of her representatives, to seek her consent, release or authorization to sell the Interview, or any portion thereof, to any publication other than US Magazine.

17. At no time did Forum or Penthouse contact, or attempt to contact, in any manner, Cher, or any of her representatives, to seek her consent, release or authorization for Forum to publish the Interview, or any portion thereof, in Forum Magazine as an exclusive interview to Forum.

18. Robbins submitted to Forum the entire transcript of the Interview, and Forum edited and altered the text of the transcript by designating "FORUM:" as the poser of questions and "CHER:" as the responder. Forum Magazine was not the poser of questions at the original Interview.

19. Penthouse employees coordinate all circulation efforts of Forum Magazine and prepare and cause to be published all advertisements for Forum Magazine, and did so in this instance. All circulation and advertising efforts of Penthouse are approved and authorized by Forum and each such effort in this instance was so authorized and approved.

20. In or about February, 1981, Penthouse and Forum caused to be created and placed for publication a newspaper advertisement advertising the purchase of Forum Magazine, which utilized Cher's name and likeness (hereinafter referred to as the "Newspaper Advertisement"). Said Newspaper Advertisement was placed and published in excess of one hundred times in at least twenty-seven newspapers around the United States and in Canada.

21. In or about February, 1981, Penthouse and Forum caused to be created and placed for broadcast, a radio advertisement advertising Forum Magazine and utilizing Cher's name (hereinafter referred to as the "Radio Advertisement"). Said Radio Advertisement was placed and broadcast in excess of seven hundred times over at least one hundred radio stations around the United States.

22. In or about February, 1981, Penthouse, and

Forum caused to be created and placed for publication, a subscription advertisement for Forum Magazine which utilized the name and likeness of Cher, and express words of endorsement by Cher of Forum Magazine, which subscription advertisement was published in the February, 1981, and the March, 1981, issues of Penthouse Magazine (hereinafter referred to as the "Penthouse Subscription Advertisement").

23. In or about February, 1981, Penthouse and Forum caused to be created and placed for publication an advertisement for subscriptions to Forum Magazine, which utilized the name and likeness of Cher, and express words of endorsement by Cher of Forum Magazine, which subscription advertisement was published in the February, 1981, and the March, 1981, issues of Forum Magazine, (hereinafter referred to as the "Forum Subscription Advertisement").

24. Forum paid the sum of \$65,745 for the Newspaper Advertisements and \$143,123 for the Radio Advertisements for the March, 1981 issue of Forum Magazine, utilizing the name and likeness of Cher. If Forum were required to pay for the Penthouse Subscription Advertisement and the Forum Subscription Advertisement it would have been required to pay the sums of \$30,000 and \$3,800 respectively for each usage. The total advertising cost for advertisements utilizing the name and/or likeness of Cher was \$276,468.

25. Forum and Penthouse caused all of the above-described advertisements to be published and broadcast without the consent of Cher, and Forum and Penthouse knew that Cher had never so consented. No efforts of any kind were made by Forum or Penthouse to seek consent, release or authorization from Cher or any of her representatives for such usages.

26. The words, usages and configurations on the Forum Magazine cover, in the interview and in the advertisements are false and misleading in that they directly stated and would convey the impression to at least a substantial number or readers of Forum Magazine and of the advertisements \*100 described above that Cher chose to and did give an exclusive interview directly to Forum Magazine, when, in fact, she did not; that Cher endorses, approves and recommends the purchase of Forum Magazine, when, in fact, she does not; and that she is a reader and a satisfied reader of Forum Magazine, when, in fact, she is not.

27. The intent, design and purpose of Forum's and Penthouse's advertisements utilizing Cher's name and likeness was to trade upon and commercially exploit Cher's name, likeness, public recognition and public identification in order to induce the public to purchase Forum Magazine; to use Cher's name and likeness as an "attention getter" for said advertisements and thereby increase their value to Forum and Penthouse; and to create for Forum's and Penthouse's commercial benefit, an identification between Cher and Forum Magazine.

28. Penthouse and Forum caused the subject cover, article and advertisements to be published with actual knowledge of their falsity and with actual knowledge that their usages were not authorized by Cher.

29. The usages by Forum and Penthouse in publishing the cover and article in the March, 1981 issue of Forum Magazine and in publishing the subject advertisements, were a willful, knowing and intentional misappropriation of Cher's name and likeness, willful and knowing false statements of facts, and a blatant violation and conscious disregard for the rights of Cher.

30. The fair market value of the right to use Cher's name and likeness in the manner in which use was made herein by Forum and Penthouse is \$100,000.

31. In or about February, 1981, News Group, aware of the existence of the Forum article, solicited from Robbins the purchase of the Interview. Thereafter, Robbins sold the Interview to News Group for use as a two-part series in the Star.

32. No representative of News Group had any contact or attempted to make any contact in any manner with Cher or her representatives prior to publication of the article in the Star, to seek her consent, release or authorization for the Star to publish the Interview or any portion thereof in the Star.

33. The words, usages and configurations in the March 17, 1981 cover and article and the March 24, 1981 article in the Star are false and misleading in that they stated and would convey the impression to at least a substantial number of readers of the Star and to members of the public viewing the cover of the Star, that Cher chose to and did give an exclusive series of interviews about her life directly to the Star when, in fact, she had not. The language also indicated an autobiographical article by Cher herself

by saying "my life, my husbands, and my many many men."

34. Some of the quotations of Cher appearing in the March 17, 1981 and March 24, 1981 issues of the Star had already appeared in the March, 1981 issue of Forum Magazine, which was published and in circulation before News Group purchased the Interview from Robbins and before publication of the subject articles in the Star.

35. In or about November, 1979, News Group had made a proposal to Cher that Cher cooperate with the Star in a four or five part exclusive series on her life for payment to Cher of the sum of \$100,000. News Group's proposal was rejected by Cher.

36. News Group published its March 17, 1981 and March 24, 1981 issues of the Star with actual notice and knowledge of the falsity of their statements and usages, and News Group knew that an "exclusive series" on Cher's life in the Star would be, and was, unauthorized by Cher.

37. The usages by News Group in publishing the cover and article in its March 17, 1981 issue and the article in its March 24, 1981 issue of the Star, were a willful, knowing and intentional misappropriation of Cher's name and likeness, willful and knowing false statements of facts, and a conscious disregard for the rights of Cher.

38. The manner of selling copies of the Star at supermarket checkout stands encourages purchasers to purchase the Star in part depending upon the content of the cover. The inducement to purchase the March 17, 1981 issue of the Star was dependent in part upon the false impressions generated by the improper usages of Cher's name and photograph, in much the same manner as is an inducement to purchase from an advertisement.

39. The acts of Robbins were a willful, knowing and intentional misappropriation of Cher's name and likeness and a conscious disregard of the rights of Cher.

40. The fair market value of the right to use Cher's name and likeness in the manner in which use was made herein by News Group is \$100,000.

41. The uses of Cher's name and likeness by Forum and News Group complained of herein, were solely for purposes of enhancing the sales of Forum Magazine and the Star respectively, for a

commercially exploitive effect, rather than for the purpose of \*101 informing the public about a newsworthy event.

42. The words, usages and configurations by Forum, Penthouse and News Group herein, caused actual confusion and caused readers thereof to believe that Cher had given exclusive interviews directly to Forum Magazine and to the Star and that Cher had endorsed Forum Magazine.

43. By virtue of the false impressions created by defendants, Cher was subjected to personal consternation, frustration and humiliation.

44. The following conclusions of law insofar as they may be considered findings of fact are so found by this Court to be true in all respects.

#### Conclusions Of Law

1. This is an action brought within the jurisdiction of this Court pursuant to 28 U.S.C. § § 1131, 1338 and 15 U.S.C. § 1121, with respect to those claims arising under 15 U.S.C. § 1125(a) (The Lanham Act), the doctrine of pendent jurisdiction, and pursuant to 28 U.S.C. § 1332 (diversity of citizenship).

2. Other than those claims arising under Federal law, the law of the State of California is applicable herein.

#### Misappropriation of Right of Publicity

[1] 3. The law affords protection to an individual's proprietary interest in his own identity (*Motschenbacher v. R. J. Reynolds Tobacco Company*, 498 F.2d 821, 825 (9th Cir. 1974)). The right of a person to the use of his name and likeness is a right of value upon which plaintiff can capitalize by selling licenses (*Lugosi v. Universal Pictures*, 25 Cal.3d 813, 819, 160 Cal.Rptr., 172 USPQ 541 (1970)).

4. A celebrity or other public figure has the right to control the publicity and establish conditions for the use of his or her name and likeness when he or she chooses voluntarily to give an "exclusive interview" to a particular publication. That celebrity has the right to delineate the conditions and controls over such usage by the publication. Any subsequent usage by the publication, or by a third party who has knowledge of the existence of any such conditions or controls, not in accordance

with such delineation, and without the consent of the celebrity, is a wrongful appropriation of the commercial value of the celebrity's identity and right of publicity.

[2][3] 5. The publication of the March, 1981 issue of Forum Magazine, and the publication of the Newspaper Advertisement, the Radio Advertisement, the Penthouse Subscription Advertisement and the Forum Subscription Advertisement, constituted a misappropriation of Cher's right of publicity by Forum and Penthouse. Penthouse is liable as a joint tortfeasor with Forum by reason of its direct participation in the preparation and placement of the advertisements, and in publishing the Penthouse Subscription Advertisement knowing it to be false and a misappropriation of Cher's rights.

6. The publication of the March 17, 1981 cover and article and the March 24, 1981 article in the Star constituted a misappropriation of Cher's right of publicity by News Group.

[4] 7. Robbins is also liable for misappropriation of Cher's right of publicity because the Interview was given to him in his capacity as an agent of US Magazine, with the full knowledge of the exclusiveness of the interview to US Magazine. The subsequent usage of such Interview, without Cher's consent, constitutes a misappropriation, and Robbins is liable for the consequences thereof. Robbins is jointly and severally liable with Forum and News Group for the general and special damages assessed against them.

#### Misappropriation for Advertising

8. In California, the use of a person's name, photograph or likeness for advertising purposes without consent is prohibited by statute and common law (California Civil Code § 3344; *Fairfield v. American Photocopy, Etc., Co.*, 138 Cal.App. 2d 82, 85, 291 P2d 194 (1955)).

[5] 9. The publication of the Newspaper Advertisement, the Radio Advertisement, the Penthouse Subscription Advertisement and the Forum Subscription Advertisement constituted a knowing and willful misappropriation of Cher's name and likeness for advertising purposes by Forum and Penthouse.

10. Such misappropriation exists even if,

arguing, the initial cover and article were not unlawful as to Cher. The advertising is not merely "incidental" to the original publication and the express words of endorsement and other usages go much further than establishing the news content and quality of the periodical (*Namath v. Sports Illustrated*, 80 Misc.2d 531, 363 N.Y.S.2d 276 (1975), *aff'd* 39 N.Y.2d 897, 386 N.Y.S.2d 397 (1976)).

11. By reason of Penthouse's direct participation in the preparation and placement of these advertisements, and by its publication \*102 of the Penthouse Subscription Advertisement knowing it to be false and a misappropriation, Penthouse is liable as a joint tortfeasor with Forum. Robbins is liable jointly and severally for the consequences of his acts.

#### Lanham Act Violations

[6][7][8] 12. The actions of Forum, Penthouse and News Group constitute violations of Section 43(a) of the Lanham Act. Although Section 43(a) is contained in the Lanham Act, which primarily relates to federally registered trademarks, liability under Section 43(a) may arise for a false description or representation even though no trademark is involved (*Smith v. Montoro*, 648 F.2d 602, 605, *fn. 3*, 211 USPQ 775, 779, *fn. 3* (9th Cir. 1981)). Moreover, the names of movie actors and other performers may, under certain circumstances, be registered under the Lanham Act as service marks for entertainment services (See, e.g. *Re Carson*, 197 USPQ (BNA) 554.) Although Cher has not alleged that her name is registered as a service mark, registration of a trademark or service mark is not a prerequisite for recovery under Section 43(a) (*Smith, supra.*, 648 F.2d at 605, 211 USPQ at 779). Additionally, the plaintiff under Section 43(a) need not be in actual competition with the alleged wrongdoer (*Smith, supra.*, 648 F.2d at 607, 211 USPQ at 780-781).

[9] 13. The Lanham Act extends to misrepresentations in advertising as well as labelling of products and services in commerce (*Benson v. Paul Winley Record Sales Corp.*, 452 F.Supp. 516, 517, 204 USPQ 498, 498-499 (S.D.N.Y. 1978)). The Lanham Act proscribes any false designation or representation in connection with any goods or services in interstate commerce (*Smith v. Montoro, supra.*, 648 F.2d at 604, 211 USPQ at 778).

14. Penthouse is liable as a joint tortfeasor by virtue of its direct participation in the preparation and placement of the advertisements, and by its publication of the Penthouse Subscription Advertisement knowing it to be false and a misappropriation. Robbins is liable jointly and severally for the consequences of his acts.

#### Unfair Competition

[10] 15. California Business and Professions Code § 17200 defines unfair competition as including "unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising \* \* \*." In California, it is also an act of unfair competition for a person to induce the public to purchase a product by making an untrue or misleading statement in any newspaper or other publication (California Business and Professions Code § 17500). The California Unfair Competition Law is extremely broad, encompassing any unlawful, unfair or deceptive business practice (Barquis v. Merchants Collection Assn., 7 Cal.3d 94, 111, 101 Cal.Rptr. 745 (1972)).

16. The acts of Forum, Penthouse and News Group constituted acts of unfair competition. Penthouse is liable as a joint tortfeasor by virtue of its direct participation in the preparation and placement of the advertisements, and by publishing the Penthouse Subscription Advertisement knowing it to be false and a misappropriation. Robbins is liable jointly and severally for the consequences of his acts.

#### Constitutional Privilege

[11] 17. In an action for invasion of right of privacy, which depends for its existence upon some element of falsity, a public figure must prove actual malice, that is, knowledge or reckless disregard for the truth, in order to recover against a media defendant (Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967)). However, where the claim does not depend upon an element of falsity in the sense involved in Time, Inc. v. Hill, but is rather an appropriation of name and likeness for commercial purposes, the actual malice standard is not applicable. (Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573, 97 S.Ct. 2849, 53 L.Ed.2d 965, 193 USPQ 734 (1977), National Bank of Commerce v. Shaklee Corp., 503 F.Supp. 533, 540, 207 USPQ 1005, 1010-1011 (W.D. Tex. 1980)).

[12] 18. The privilege of using a public figure's picture in connection with an item of news does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information (Ali v. Playgirl, 447 F.Supp. 723, 727, 206 USPQ 1021, 1023- 1024 (S.D.N.Y. 1978)). A person is not stripped of his or her rights merely because he becomes a public figure, and the actual malice requirement does not extend to situations where, as here, the name of a public figure is being used in an exploitative, commercial fashion (Lerman v. Chuckelberry Pub. Inc., 496 F.Supp. 1105, 1110 (S.D.N.Y. 1980)).

19. The rationale for protecting the right of publicity is the straightforward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having defendants get for free some aspect of Cher that has market value and for which \*103 they would normally pay (Zacchini v. Scripps-Howard Broadcasting Co., supra., 433 U.S. at 576, 193 USPQ 734).

20. Even assuming, arguendo, that the actual malice test were applicable herein, and to the extent it may be applicable to the false statements of fact, Cher has satisfied the requirements of that test by establishing the defendants' actual knowledge of the falsity of their statements and usages or reckless disregard for the truth.

#### Damages

21. Cher is entitled to general, special and exemplary damages, against Robbins, Forum and News Group and to special damages against Penthouse, as well as costs of suit against all defendants.

#### (a) General Damages

[13] 22. Defendants Robbins, Forum and News Group are liable for damage to Cher for having falsely stated and having created the wrongful impression in the minds of the public that Cher gave exclusive interviews to Forum Magazine and to the Star. Forum is additionally liable for creating the wrongful impression that Cher endorsed Forum Magazine.

23. The amount of damages necessary to reasonably compensate Cher for the injury suffered by her as a result of the wrongful, false impressions created by defendants in the mind of the public is

within the discretion of this Court. A fair approximation of the measure of damages that would be necessary to conduct a reasonable corrective advertising campaign to inform the public that the usages by defendants were wrongful, and of the true facts. In other cases the court have awarded a sum equal to twenty-five percent of the cost of defendant's wrongful initial advertising (Big O Tire Dealers v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1374, 195 USPQ 417, 424-425 (10th Cir. 1977)). In this case, the value of Forum's false, misleading and wrongful advertising using Cher's name and likeness, was \$276,468 and, thus, an award of \$69,117 is appropriate to Cher against Robbins and Forum.

24. The effect of and injury to Cher by the false, misleading and wrongful usage of Cher's name and likeness by News Group is similar to an extensive advertising campaign. Thus, in the Court's discretion, an award of \$69,117 is an appropriate measure of general damages against Robbins and News Group.

(b) Special Damages

[14] 25. Defendants Robbins, Forum, News Group and Penthouse are liable for special damages to Cher for the reasonable value of their wrongful usage of Cher's name and likeness.

26. In the case of the usage by News Group, the value has been established by News Group itself in its prior negotiations with representatives of Cher. Damages for the value of the usage of Cher's name and likeness against News Group and Robbins are \$100,000.

27. Damages against Forum, Penthouse and Robbins for the value of the usage of Cher's name and likeness are \$100,000.

(c) Exemplary Damages

28. In California, exemplary damages are recoverable for torts where defendant's acts are carried on with a conscious disregard for the rights of plaintiff or by means of an intentional misrepresentation or deceit (California Civil Code § 3294).

29. Exemplary damages against Forum shall be in the amount of \$100,000, against News Group in the amount of \$200,000 and against Robbins in the

amount of \$25,000.

(d) Costs of Suit

30. Cher's awarded costs of suit herein incurred against all defendants.

31. Any conclusions of law contained in the Findings of Fact are incorporated herein by reference.

Let judgment be entered accordingly.